WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LORI GARDNER, ***Applicant***

vs.

LOS ALAMITOS UNIFIED SCHOOL DISTRICT;
permissibly self-insured, administered by KEENAN & ASSOCIATES, ***Defendants***

Adjudication Number: ADJ18356537
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the February 14, 2025 Findings and Order issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained admitted industrial injury to the right elbow while employed on October 22, 2020. The WCJ further found that Los Alamitos School District has a right to credit in this matter in the amount of $818,312.86; that the $818,312.86 third party credit inuring to Los Alamitos School District is a credit against compensation which attaches to all species of benefits payable to applicant under Division 4; and that no attorney fees are awarded as there is no corpus to draw an attorney fee from. Based on these findings, the WCJ ordered that defendant's Petition for Credit is granted in the amount of $818,312.86.

Applicant contends that the WCJ erred in granting defendant's Petition for Credit arguing that defendant was concurrently negligent beyond a de minimis amount.

We received defendant's Answer. The WCJ issued a Recommendations on Petition for Reconsideration recommending that we deny reconsideration.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further

consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Preliminarily, we note that former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
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> (b)
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> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on March 13, 2025 and 60 days from the date of transmission is May 12, 2025. This decision is issued by or on May 12, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on March 13, 2025, and the case was transmitted to the Appeals Board on March 13, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on March 13, 2025.

II.

The WCJ provided the following discussion in the Opinion on Decision:

> Applicant was employed as a school nurse for defendant Los Alamitos Unified School District (hereinafter, "LAUSD") when she sustained an industrial injury arising out of and during the course of her employment on October 22, 2020. Applicant sustained industrial injury to her right elbow, right arm, right shoulder and right upper extremity.
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> Applicant's injury resulted from a slip and fall on a curb outside Oak Middle School, a school within LAUSD. On the date of the injury, applicant parked her car outside of the school's parking lot. She grabbed her tote and coffee, and when she stepped up on the curb her foot got caught inside a hole and she fell (MOH/SOE, November 14, 2024, page 4, lines 8-10). According to applicant's testimony, there were lots of leaves everywhere, including the gutter and on the street. The leaves also covered a hole in the curb. When she stepped up on the curb, her shoe went into the hole and got stuck there. This caused her to lunge forward, and she fell on her left wrist, palm, elbow, followed by her right palm, and both knees (MOH/SOE, November 14, 2024, page 4, lines 17-20.) She further testified that the times she did park on Oak Street, she did not notice a hole in the curb. She was also unaware of any coworkers noticing a hole in the curb, and no one mentioned there was a hole in the curb (MOH/SOE, November 14, 2024, page 4, lines 22-24.).
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> The school district filed a civil suit against the City of Los Alamitos for failure to fix the hole (MOH/SOE, November 14, 2024, page 5, lines 2-3.). Through a third party action involving applicant joining against the City, she resolved the matter by way of settlement for a gross amount of $1,450,000.00 with the applicant receiving a net distribution of $818,312.86 after costs and fees were deducted (Exhibit B).
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> The current limited issue before the Court is defendant's Petition for Credit in the amount of $818,312.86 based on the applicant's settlement with the City of Los Alamitos where the injury occurred. Applicant, however, alleges that there exists comparative negligence on the part of the employer that would establish

a threshold where benefits would need to be paid before defendant can assert their credit. Further, applicant claims that based on such negligence, the employer would not be entitled to any credit.

DEFENDANT'S PETITION FOR CREDIT AND COMPARATIVE NEGLIGENCE

Employer's Negligence

As stated in the Court's opinion in *Cole,* "When the issue of the employer's concurrent negligence arises in the context of his credit claim based on a third party settlement, the board must determine the appropriate contribution of the employer since the employee's recovery does not represent a judicial determination of tort damages. Specifically, the board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled." *Associated Construction & Engineering Co. v. W.C.A.B.* (Cole) (1978) 150 Cal. Rptr. 888, 869; 43 Cal.Comp.Cases 1333.

Applicant's civil claim resolved via settlement instead of via jury award at trial, which as it relates to the total damages applicant is entitled to, could have been the same if not higher than the ultimate settlement amount. Having addressed the damages discussion per *Cole,* we turn to negligence and the degree of fault of the employer.

As to the issue of whether or not the employer was negligent to any degree, at trial the applicant provided testimony while defendant also called witnesses from City of Los Alamitos as well as defendant employer LAUSD. Subsequent to applicant's testimony, defendants called the following witnesses: City of Los Alamitos administrative services manager Chelsi Wilson and the deputy city manager/director of development services, Ron Noda; former LAUSD maintenance supervisor Anthony Olvera, and former LAUSD custodian Daniel Salas.

Ms. Wilson and Mr. Noda testified that City of Los Alamitos received notifications from LAUSD as to a defect in the City of Los Alamitos's sidewalk in front of the middle school where the injury occurred. Notification came in the form of emails and requests for the City of Los Alamitos to perform repairs. Their testimony also confirmed that although notifications were sent to City of Los Alamitos September 2019, the repair to the sidewalk performed by City of Los Alamitos did not occur until more than a year after applicant's injury.

Where the employer has knowledge of a dangerous condition in the workplace caused by the negligence of a third party, or reasonably should have discovered it, and fails to take reasonable steps either to alleviate the danger or to give an adequate warning in order to prevent injury to employees, the employer, for purposes of the credit determination, must, as a matter of law, be found

concurrently negligent to a degree greater than a de minimis amount. *Bonner v. Workers' Comp Appeals Bd*. (1990) 225 Cal.App.3d 1023, 1037, 55 Cal.Comp.Cases 470.

As mentioned, the civil matter resulted in a settlement rather than a jury trial. What City of Los Alamitos witness testimony established is that City of Los Alamitos is the party responsible for repairing the sidewalk, was on notice as to the defect, and failed to address that defect prior to applicant's injury. The question then turns to employer LAUSD. Defense witness Mr. Olvera, was the maintenance supervisor at LAUSD. (MOH/SOE, November 14, 2024, page 10, line 22). Mr. Olvera testified that he supervised all of the maintenance and operations within the district, including managing the maintenance staff, grounds staff, and the custodial staff. He also handled any issues at the school sites regarding facility and operations and then would have staff or vendors do the repairs where appropriate. (MOH/SOE, November 14, 2024, page 11, lines 1-4).

According to his testimony, Mr. Olvera's usual practice was to use a work order system to report issues to be addressed and any work orders to be addressed by the City of Los Alamitos were sent via email to the city maintenance supervisors and administrators (MOH/SOE, November 14, 2024, page 11, lines 10-11) Further, the only way Mr. Olvera would know when the city took care of a work order is if they [the City of Los Alamitos] verbally told him, he received an email confirmation, or he went on site and saw it was repaired (MOH/SOE, November 14, 2024, page 11, lines 16-18.) He also testified that he did not recall receiving a response to his email to the City of Los Alamitos in September 2019. Information regarding the work orders to the City was typically shared with Danny Salas, the custodian, the assistant principal, and principal and office manager. Mr. Olvera's testimony emphasized that typically no other action is taken regarding warnings to either staff or students as to defects on city property. Further, once the City of Los Alamitos was notified of the defect that needed to be repaired, it is their responsibility to do so. His testimony also referred to a different procedure were the problem occurring within the school, which includes the subject area being cautioned off and the people being made visually aware of the issue (MOH/SOE, November 14, 2024, page 13, lines 1-7.) Mr. Salas, a now-retired head custodian, first became aware of the hole in the sidewalk that needed repair when he was contacted by Mr. Olvera (MOH/SOE, December 11, 2024, page 2, lines 24-25.) There were some conflicts in testimony where it appears that Mr. Salas referred to procedures once a defect was discovered whether on or off school property. He testified that once a defect was discovered, he was to go to the place where the defect was located, take pictures, submit a work order request, and then cone or tape off the area. (December 11, 2024, page 3, lines 11-13.)

At trial, it was unrebutted that the City of Los Alamitos did not repair the subject

broken sidewalk until two years after receiving notice of the defect from LAUSD in 2019 and one year after applicant's slip and fall; thus the City of Los Alamitos failed to maintain safe premises. As discussed, where the employer LAUSD could be found liable for negligence is in their failure to alleviate the danger or to give an adequate warning in order to prevent injury to employees, the employer, and for purposes of the credit determination, must, as a matter of law, be found concurrently negligent to a degree greater than a de minimis amount.

The WCJ notes that it would not have been possible for LAUSD to alleviate the danger ***if*** the manner in which that occurs is actual repairs to the property because that is the responsibility of the City of Los Alamitos. While LAUSD did report the damaged area to the City of Los Alamitos well in advance of the date of injury, they did not provide a warning to their employees. However, following review of the evidence, including the condition of the property on the date of injury, as well as testimony, any concurrent negligence on the part of LAUSD is not to a degree greater than a de minimis amount.

The Court finds that based on the evidence, including credible testimony of the applicant as well witnesses from the City of Los Alamitos and LAUSD, the employer did not breach their duty of care to a degree greater than a de minimis amount. Defendants are entitled to their credit in the amount of $818,312.86.

(Opinion on Decision, at pp. 3-7, emphasis in original.)

III.

We highlight the following legal principles that may be relevant to our review of this matter:

Section 3861 requires the Appeals Board to "allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer." (Lab. Code, § 3861.)

In *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (Cole)* (1978) 22 Cal.3d 829 [43 Cal.Comp.Cases 1333], the California Supreme Court observed "that the concurrent negligence of the employer bars his right to a credit against his liability for compensation for the amount of any recovery for his injury obtained by the employee by settlement of his cause of action against third parties; and [] that where the employer's negligence has not been adjudicated in such third party action, the applicant is entitled to have it adjudicated before the Board." (*Id*. at p. 835.) Accordingly, "[w]hen the issue of an employer's concurrent negligence

arises in the context of his credit claim based on a third party settlement, the board must determine the appropriate contribution of the employer since the employee's recovery does not represent a judicial determination of tort damages. Specifically, the board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled. The board must then deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault." (*Id*. at p. 843.)

One year later, we issued our en banc decision in *Martinez v. Associated Engineering and Construction Co.* (1979) 44 Cal.Comp.Cases 1012 (Appeals Board en banc), wherein we described the shifting burdens of proof necessary to effectuate the analysis described in *Cole, supra*:

> First, defendant has the burden of proof to establish its right to claim a credit. It must show that there was a third party settlement and that it has paid out compensation benefits or will likely have to pay such benefits in the future. This can be done by production of certified copies of the Superior Court documents reflecting a settlement or judgment. Normally however, as in this case, copies of the documents or a stipulation as to applicant's net recovery will suffice.
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> Second, once a prima facie case has been made to show entitlement to credit, applicant has the burden of proof to establish the employer was negligent in any degree. If there is no employer negligence, the carrier is entitled [*14] to full credit.
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> Third, the burden of going forward shifts to the employer or carrier to show comparative negligence of the third party defendant or defendants and any negligence by applicant.
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> Fourth, the burden then shifts to applicant to establish his total damages, i.e., that figure to which the employer's negligence is applied after deducting applicant's proportionate share of comparative negligence, to determine credit in accordance with the formula in Associated (Cole), supra. In this case, it was unnecessary for applicant to prove, or the workers' compensation judge to determine, applicant's actual damages in view of the finding on employer negligence. Thus, where the evidence establishes 100% employer negligence, or overwhelming employer negligence, or even a high degree of employer negligence, it would be necessary to take only enough evidence to establish that

compensation benefits could not possibly exceed the employer's share of the damages.

(*Id*. at p. 1021.)

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Based on our review, we are not persuaded that there is substantial evidence to support the WCJ's decision without additional development of the record.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

IV.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for

reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

V.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. ***While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to*** WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSE H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 12, 2025

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

LORI GARDNER
LAW OFFICE OF JONATHAN P. BRIAN
THE OAKS LAW GROUP

PAG/bp

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o